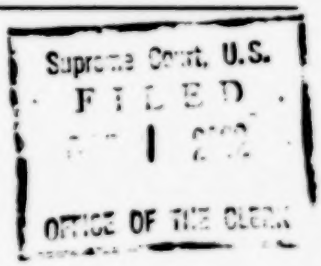
DOCKET NO. 02-6683 (2)

SUPREME COURT OF THE UNITED STATES



HERNAN O'RYAN CASTRO

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW, Petitioner Hernan O'Ryan Castro, by and through counsel appointed under the Criminal Justice Act of 1964, 18 U.S.C. §3006A(d)(6) by the United States District Court for the Southern District of Georgia, Savannah Division, on July 25, 2000, and asks for leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

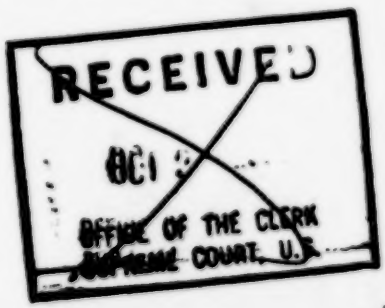
This 30th day of September, 2002.

Michael G. Frick

MICHAEL G. FRICK
Georgia Bar # 277125
N. DANIEL LOVEIN
Georgia Bar # 459329

Attorneys for Petitioner Hernan O'Ryan Castro

HALL, BOOTH & SMITH, & SLOVER P.C.
11 St. Andrews Court, Ste. 200
Brunswick, GA 31520
(912) 554-0093



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I. QUESTION PRESENTED FOR REVIEW

When a United States District Court re-characterizes a pro-se federal prisoner's first post conviction motion as a habeas petition under 28 U.S.C. §2255, does such re-characterization render the prisoner's subsequent attempt to file a first titled §2255 petition a "second or successive petition" within the purview of the Antiterrorism and Effective Death Penalty Act (AEDPA)?

II. LIST OF ALL PARTIES TO PROCEEDING IN ELEVENTH CIRCUIT COURT OF APPEALS

A. United States of America
B. Hernan O'Ryan Castro

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B. Castro v. United States 290 F.3d 1270 (11th Cir. 2002)

VII. STATEMENT OF BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed in this petition was entered May 7, 2002. The Court of Appeals entered an Order July 5, 2002, denying Petitioner's Petition for Rehearing. 28 U.S.C. §1254 confers jurisdiction on this Court to review on Writ of Certiorari the opinion of the 11th Circuit in Castro v. United States, 290 F.3d 1270 (11th Cir. 2002).

VIII. **STATUTES INVOLVED IN CASE**

28 U.S.C. §2255

28 U.S.C. §2244

Antiterrorism and Effective Death Penalty Act of 1996, 104 P.L. 132, 110 Stat. 1214

IX. **STATEMENT OF THE CASE**

This Petition arises from the opinion of the United States Court of Appeals for the Eleventh Circuit of May 7, 2002, in the case of Castro v. United States, 290 F.3d 1270 (11th Cir. 2002). (Appendix A). In its opinion, the 11th Circuit Court of Appeals affirmed the Order of the United States District Court for the Southern District of Georgia, dated April 11, 2001, (Appendix B-1) wherein the District Court concurred with the Magistrate Judge's Report and Recommendation (Appendix B-2) and dismissed Hernan O'Ryan Castro's (hereinafter referred to as "Castro") Petition for Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. §2255. Mr. Castro is currently incarcerated.

In an indictment returned on September 3, 1991, Castro was charged with conspiracy to distribute and possess with intent to distribute cocaine (count one) and conspiracy to import cocaine (count two) in violation of 21 U.S.C. §§ 846 and 963. Castro was convicted and sentenced to 240 months imprisonment on July 14, 1992. Castro then appealed his conviction and sentence. The Eleventh Circuit affirmed both on March 24, 1994. See United States v. Taylor, 17 F.3d 333 (11th Cir. 1994), cert. denied, 513 U.S. 950 (1994).

On July 11, 1994, Castro filed a pro-se Motion for New Trial and Brief in Support Thereof pursuant to Federal Rule of Criminal procedure 33, allegedly based on newly discovered evidence. (Appendix F-1). Castro alleged in his Rule 33 Motion that he had discovered new evidence that the Government had entered into an immunity agreement with a witness who testified against Castro at his trial. Castro also alleged that the Government's failure to disclose the immunity agreement violated the doctrines set forth in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States,

504 U.S. 150 (1972). Additionally, Castro asserted that the Government knowingly used perjured testimony to obtain his conviction.

In response to Castro's pro-se Motion for New Trial pursuant to Rule 33, the Government asserted to the District Court that the Government had no objection to Castro's Rule 33 Motion for New Trial being treated as a demand for relief under both Rule 33 and 28 U.S.C. § 2255. (Appendix F-2). After receiving the Government's response to his Rule 33 Motion, Castro filed a pro-se Reply to the Government's Response in which Castro stated that he had properly filed his Motion for New Trial under Federal Rule of Criminal Procedure 33. (Appendix F-3).

In an Order entered October 28, 1994, the United States District Court for the Southern District of Georgia denied Castro's pro-se Motion for New Trial. (Appendix B-3). However, the Order stated: "In the government's response, the government asserts that it has no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33 and 28 U.S.C. §2255. Accordingly, the court will consider defendant's motion as requesting both kinds of relief." Therefore, in denying Castro's pro-se Motion for New Trial, the District Court considered Castro's Motion as requesting relief under both Rule 33 and 28 U.S.C. §2255.

Castro appealed the denial of his self-titled Rule 33 Motion to the Eleventh Circuit Court of Appeals. In its opinion affirming the District Court's denial of Castro's Motion, the Eleventh Circuit Court of Appeals stated that the appeal arose "from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255 and motion for new trial, Fed. R. Crim. P. 33." (Appendix B-4).

On April 22, 1997, Castro, acting pro-se, and after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (which amended 28 U.S.C. §2255 by barring federal habeas

petitioners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances), filed his first titled 28 U.S.C. §2255 habeas petition. (Appendix F-4). Castro's petition alleged, among other things, that he was rendered ineffective assistance of counsel in violation of the Sixth Amendment in that his trial counsel did not move to suppress Castro's post-arrest statements which were made in violation of his Sixth Amendment rights. The District Court adopted the Report and Recommendation of the Magistrate Judge and denied Castro's §2255 Petition on April 13, 1998. (Appendix B-5).

The Eleventh Circuit Court of Appeals then granted Castro's (still acting pro-se) Motion for Certificate of Appealability on the issue of whether counsel was ineffective by not adequately arguing to suppress Castro's post-arrest statements. In its Order of June 13, 2000, the Eleventh Circuit Court of Appeals found that the District Court had not applied Sixth Amendment analysis in deciding whether or not Castro's trial counsel was ineffective in failing to move to suppress statements Castro made after his arrest. (Appendix B-6). Therefore, the Eleventh Circuit vacated the decision of the District Court and remanded with instructions to the District Court to employ Sixth Amendment analysis, develop more fully the facts surrounding Castro's claim, and examine the record to determine if the petition is successive. Also, the Eleventh Circuit Court of Appeals suggested that the District Court hold an evidentiary hearing with regard to the post-arrest statements and suggested the appointment of counsel for Castro would assist the Court. The undersigned attorneys for Castro were then appointed by the Court to represent Castro. (Appendix F-5).

Before the evidentiary hearing was held, the Government filed a Motion to Dismiss Castro's Successive Petition pursuant to 28 U.S.C. §2255 on September 13, 2000. (Appendix F-6). The Government acknowledged in its Motion to Dismiss that on July 14, 1994, Castro had filed a Motion

for New Trial based on newly discovered evidence. However, the Government argued that because the District Court grounded its holding also under §2255, and because the Eleventh Circuit termed Castro's pleading as a combined 28 U.S.C. §2255 petition and Rule 33 Motion for New Trial, Castro's first self-titled §2255 petition was successive, and should be dismissed pursuant to AEDPA.

On September 29, 2000, an evidentiary hearing was held in the United States Magistrate Court. The proceedings of the Magistrate hearing are not part of this appeal, as on January 30, 2001, the Magistrate Court Judge issued a Report and Recommendation granting the Government's Motion to Dismiss Castro's 28 U.S.C. § 2255 Petition as successive. (Appendix B-7). The substance of Castro's petition and the issues raised at the evidentiary hearing were not ruled upon. Thereafter, on April 11, 2001, the District Court adopted the Report and Recommendation of the Magistrate Court and dismissed Castro's petition. (Appendix B-1). On April 25, 2001, the District Court granted a Certificate of Appealability with respect to the issue of whether the 28 U.S.C. §2255 Petition filed by Castro is a successive petition.

After receiving briefs from Castro and from the United States, the United States Court of Appeals for the Eleventh Circuit entered an opinion on January 2, 2002, in favor of Castro. (Appendix B-8). In its opinion of January 2, 2002, the Court held that "a district court's re-characterization of a petitioner's initial post conviction motion will not be considered a first Habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization." The Eleventh Circuit found in its January 2, 2002, opinion that "Castro's original Rule 33 Motion for New Trial asserted a cognizable ground for relief and that it was based upon alleged new evidence which Rule 33 explicitly provides as a basis for bringing such a motion." The court held that it was inconceivable that Castro or any other pro-se litigant could have foreseen

the ultimate consequences of the district court's re-characterization of his Rule 33 motion. (Appendix B-8). The Eleventh Circuit recognized the unfairness inherent in re-characterizing the Rule 33 motion and held that the re-characterization would not count as a first habeas petition. Therefore, the court found that Castro's §2255 petition is not successive and remanded the case to the district court to consider the merits of the petition. (Appendix B-8).

Thereafter, mandate never issued as required by Rule 41 of the Federal Rules of Appellate Procedure and on May 7, 2002, surprisingly, the Eleventh Circuit vacated its opinion of January 2, 2002, and substituted a completely opposite opinion. (Appendix A). Specifically, the Eleventh Circuit held in its opinion dated May 7, 200, that Castro's §2255 petition is successive. In support of its one hundred and eighty degree change in opinion, the court held that to allow Castro to file his current §2255 petition "might undermine the congressional purpose behind the AEDPA, which is to limit successive §2255 petitions. Therefore, the Court disagreed with the First Circuit's opinion in Raineri v. U.S., 233 F.3d 96, 99 (1st Cir. 2000). Instead, the Court suggested that "in the future, district courts should warn petitioners of the consequences of re-characterizing their motions as §2255 petitions." The same panel which entered the January 2, 2002, opinion entered the May 7, 2002, opinion. The Honorable Justice Roney dissented to the May 7, 2002, opinion.

On May 24, 2002, Castro filed a Petition for Rehearing En Banc with the Eleventh Circuit. (Appendix F-7). On July 5, 2002, the Eleventh Circuit issued an Order Denying Castro's Petition for Rehearing. (Appendix C). On July 15, 2002, the Eleventh Circuit entered a Judgment and issued mandate. (Appendix D). Finally, on July 25, 2002, the District Court ordered that the Judgment of the Eleventh Circuit be made the Judgment of the District Court and Castro's first self-titled habeas petition was dismissed and never heard. (Appendix B-9).

ARGUMENT AND CITATION OF AUTHORITY

This petition for Writ of Certiorari should be granted due to the fact that the United States Court of Appeals for the Eleventh Circuit has entered an opinion in direct conflict with opinions of the other circuits on the same important issue. Specifically, the issue presented for review is: "When a United States District Court re-characterizes a pro-se federal prisoner's first post conviction motion as a habeas petition under 28 U.S.C. § 2255, does such re-characterization render the prisoner's subsequent attempt to file a first titled § 2255 petition a 'second or successive petition' within the purview of the Antiterrorism and Effective Death Penalty Act (AEDPA)?" The answer to this question determines whether or not prisoners are afforded the opportunity to present claims of constitutional violations to the courts.

With regard to post conviction motions filed by pro-se prisoners, the federal courts have historically gone out of their way to benefit the rights of the prisoners by re-characterizing inartfully drafted post conviction motions of prisoners who mistakenly relied on inappropriate rules or statutes. Raineri v. United States, 233 F.3d 96, 97 (1st Cir. 2000), citing Haines v. Kerner, 404 U.S. 519, 520-21, 30 L.Ed. 2d 652, 92 S. Ct. 594 (1972); Prou v. United States, 199 F.3d 37, 42 (1st Cir. 1999).

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this practice was harmless and benefitted pro-se prisoners. Courts could easily re-characterize improperly filed post conviction motions as 28 U.S.C. §2255 habeas petitions and then rule on the substance of the prisoners claims. However, as explained by Raineri, Id. at 99, "AEDPA, which took effect on April 24, 1996, imposes substantial procedural restrictions on second or successive habeas petitions. Of particular relevance here, AEDPA incorporates by reference in section 2255 the same screen that makes it applicable to second or successive habeas petitions

prosecuted on behalf of state prisoners: it requires a federal prisoner, before prosecuting a second or successive habeas petition in the district court, to obtain from 'the appropriate court of appeals...an order authorizing the district court to consider the application. 28 U.S.C. §2244(b)(3)(A) (as incorporated in 28 U.S.C. §2255). In turn, AEDPA directs the court of appeals to exercise this gatekeeping power sparingly, in conformity with a rigorous set of substantive standards."

In other words, where before AEDPA, a court would be benefitting a pro-se prisoner by re-characterizing a post conviction motion as one requesting relief under 28 U.S.C. §2255, after AEDPA, the same practice would have the effect of preventing a prisoner from ever filing a first titled § 2255 habeas petition because AEDPA makes it almost impossible for a prisoner to meet the requirements necessary in order to file a second or successive petition. Specifically, in order to file a second or successive petition, a prisoner must first present the second petition to the appropriate circuit court of appeals which must determine that the prisoner has made a prima facie showing: "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Castro's argument is that it is unfair for a court to *sua sponte* re-characterize a post conviction motion as a habeas motion and then use AEDPA to prevent him from filing his first titled §2255 petition, especially when AEDPA was enacted after Castro filed his Rule 33 Motion and before he filed his first titled §2255 petition. Although the Eleventh Circuit did not agree with this argument, almost every other circuit does agree with Castro, which is why this petition for certiorari should be granted.

The only other U.S. Court of Appeals which agrees with the Eleventh Circuit on this issue is the Fifth Circuit. In In Re: Tolliver v. United States, 97 F.3d 89 (5th Cir. 1996), the Court held that a pro-se petitioner's re-characterized pleading should be deemed a habeas petition for AEDPA purposes. In Tolliver, the petitioner filed a motion to dismiss his conviction on May 20, 1996, (after AEDPA) and over his objections the district court construed his motion as a § 2255 motion and prevented him from filing a first titled § 2255 petition under the purview of AEDPA. Id., at 90.

However, every other Court of Appeals in every other circuit has decided the issue differently and has noted the unfairness inherent in the approaches taken by the 5th and 11th Circuits. The Second Circuit addressed the issue next. In Adams v. U.S.A., 155 F.3d 582 (2nd Cir. 1998), the court held that "District Courts should not recharacterize a motion purportedly made under some other rule as a motion made under §2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the courts find that, notwithstanding its designation, the motion should be considered as made under §2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized." Id., at 584.

The 3rd Circuit agreed with the 2nd Circuit in USA v. Miller, 197 F.3d 644 (3rd Cir. 1999). The Court in Miller held that if a district court chooses to recharacterize a pro se prisoner's post conviction motion as a habeas petition, it first must take prophylactic measures to warn the prisoner of the consequences of the conversion under AEDPA and give him the opportunity to withdraw the pleading. Id., at 652. The court specifically noted the "unfairness" to pro se petitioners if prophylactic measures are not taken by district courts. Id., at 649. The 3rd Circuit did not agree with

the Tolliver, id. decision and questioned why the Tolliver Court did not address or explain the fairness concerns "discussed at length in Adams". Miller, at 651.

The 1st Circuit was the next to address the issue in Raineri v. United States, 233 F.3d 96 (1st Cir. 2000). The facts in Raineri are almost identical to those in Castro's case. In Raineri, the pro-se petitioner filed what he termed a "Motion for Correction of Sentence and/or New Trial" on January 22, 1996, before AEDPA was enacted (like Castro). Id., at 98. The Court, acting *sua sponte*, and after AEDPA was enacted, found Rules 33 and 35 inapplicable, but re-characterized the motion as an application for relief under 28 U.S.C. §2255 (like Castro). Id., at 98. The Raineri Court recognized the unfairness concerns raised in Miller, id., and Adams, id. Although the Raineri Court did not propose the same prophylactic measures as Adams and Miller, the Raineri Court held "when a district court, acting sua sponte, converts a post conviction motion filed under some other statute or rule into a Section 2255 petition without notice and an opportunity to be heard (or in the alternative, the pleader's informed consent), the recharacterized motion ordinarily will not count as a "first" habeas petition sufficient to trigger AEDPA's gatekeeping requirements." Id., at 100.

In United States v. Seesing, 234 F.3d 456 (9th Cir. 2000), the Ninth Circuit adopted the decisions of the 2nd and 3rd Circuits in Adams and Miller respectively. As the Seesing Court stated, "The rule of liberal construction and its application to 28 U.S.C. § 2255 motions is for the benefit of the pro se prisoner, its rationale loses validity where it is invoked to the prisoner's disadvantage." Seesing, at 463. The Seesing Court, like the 1st, 2nd and 3rd Circuits, recognized the unfairness of recharacterizing a pro se prisoner's motion and then preventing the prisoner from filing a first titled §2255 petition. The Castro Court is the only court to address the fairness concerns, yet reach a different result.

The Tenth Circuit addressed the issue next in United States v. Kelly, 235 F.3d 1238 (10th Cir. 2000). The Court in Kelly also agreed with and adopted the approach taken by the Second and Third Circuits. Kelly, at 1242. In Kelly, Id., the prisoner filed a motion seeking relief under Fed. R. Crim. P. 32(c)(3)(D) and 35(a) and (6). Id., at 1240. The district court treated the motion administratively as a motion under 28 U.S.C. §2255. Id., at 1240. The court held that although the prisoner's motion was most appropriately viewed as a §2255 motion, because the district court did not take any steps to determine whether the prisoner agreed to its treatment of the motion, it would vacate the court's order denying the motion and remand the case so that the prisoner could make all of his collateral arguments in a single §2255 motion. Id., at 1242. The court recognized the concern of recharacterizing these motions due to the provisions of AEDPA generally prohibiting successive petitioners. Id., at 1242. Again, it seems that the 11th Circuit in Castro's case shared the same concerns in its first opinion, but authored its second opinion in direct conflict with every other circuit other than the 5th.

In Henderson v. United States, 264 F.3d 709 (7th Cir. 2001), the Seventh Circuit also agreed with the majority of the circuits. In Henderson, the petitioner prisoner filed a Fed. R. Crim. P. 33 motion and the district court deemed the motion as a §2255 petition. He then moved for leave to file his second motion under 28 U.S.C. §2255 attacking his conviction and sentence. Id., at 710. The court held that it would not "deem a Rule 33 (or other mislabeled motion) a section 2255 motion unless the movant had been warned about the consequences of his mistake." Id., at 711. Again, the 11th Circuit's decision in Castro is in direct conflict with the Seventh Circuit's decision on this issue.

Next, on May 7, 2002, the Eleventh Circuit Court of Appeals completely reversed itself when it issued its second opinion in Castro's case. Castro v. United States, 290 F.3d 1270 (11th Cir. 2002).

Reversing course, the Eleventh Circuit this time took issue with the Raineri, Id., opinion stating that to "relieve an entire class of motioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized . . . might undermine the congressional purpose behind the AEDPA, which is to limit successive §2255 motions." Id., at 1274. The Court then dismissed Castro's motion as successive and noted "in future cases where the motioner is not filing a second motion, but rather is asking to withdraw his motion or to include additional claims after a district court has decided to recharacterize the initial motion as a §2255 motion, we would agree with a clear majority of the circuits that the district courts should warn prisoners of the consequences of recharacterization and provide them with the opportunity to amend or dismiss their filings." Id. There is no rational reason for such a distinction. How was Castro supposed to know of the consequences of the court's *sua sponte* re-characterization of his Rule 33 Motion to Dismiss which was filed before AEDPA had ever been passed?

On the same day, May 7, 2002, the Fourth Circuit decided the issue differently in United States v. Emanuel, 288 F.3d 644 (4th Cir. 2002). In Emanuel, petitioner filed a Motion to Vacate his sentence and labeled it as a Rule 35 Motion. Id., at 646. The petitioner had never filed a §2255 motion for relief from his sentence. Id., at 646. The district court, *sua sponte* and without notice to the petitioner construed the motion as a §2255 motion and summarily dismissed the motion under Rule 4 of the rules governing §2255 proceedings. Id., at 646. The petitioner filed a motion arguing that the Court erred by construing his original motion, styled as a Rule 35 motion, as a §2255 motion. Id., at 646. The petitioner also attached a proposed §2255 motion listing several additional claims he wished to pursue in a collateral proceeding. Id., at 646. The petitioner requested that his original Motion to Reconsider be withdrawn and that the court consider the attached §2255 motion

and that the court reconsider its Order denying relief. Id., at 646. The district court found that it had properly construed the petitioner's Rule 35 motion as a §2255 motion and denied all requested relief. Id., at 646.

The Fourth Circuit Court of Appeals then, after considering the decisions on this issue from all of the other Circuits, including the Eleventh Circuit's first decision in Castro v. United States, 277 F. 3d 1300 (11th Cir. 2002), vacated the district court's orders denying the petitioner relief and remanded the case for further proceedings. Specifically, the Court in Emanuel, held ". . . if a prisoner files a motion that is not denominated as a section 2255 motion and the court at its option prefers to convert it into the movant's first section 2255 motion, the court shall first advise the movant that it intends to so recharacterize the motion. The court shall also notify the movant of the section 2255 restrictions on second or successive motions, the one year period of limitations, and the four dates in section 2255 to be used in determining the starting date for the limitations period. The notice to the movant shall set a reasonable amount of time for the prisoner to respond to the court's proposed recharacterization and shall advise the prisoner that failure to respond within the time set by the court will result in the original motion being recharacterized as a section 2255 motion." Emanuel, at 649. The Court then went on to state that because the petitioner was not given notice of the adverse consequences of having his Rule 35 motion construed as an initial §2255 motion, the district court's order denying the petitioner relief would be vacated and the case would be remanded for further proceedings. Emanuel, at 650. In support of its opinion, the Emanuel Court cited the Eleventh Circuit's first opinion in the Castro case. Emanuel, at 649. Therefore, on the same day the Eleventh Circuit reversed itself, the Fourth Circuit issued an opinion on the same issue

and followed the Eleventh Circuit's initial opinion before it was vacated. The need for this Honorable Court's intervention is apparent.

On July 10, 2002, the Sixth Circuit decided the issue for the first time in In Re: Shelton, 295 F. 3d 620 (6th Cir. 2002). In Shelton, the petitioner, after being sentenced, filed with the district court a motion captioned "Motion to Dismiss for Lack of Territorial Jurisdiction." Shelton, at 621. The district court, without giving prior notice to Shelton, construed the motion as one filed pursuant to 28 U.S.C. §2255 and dismissed it. Shelton, at 621. Later, the petitioner filed a second motion in the district court arguing that his counsel had rendered ineffective assistance and the petitioner filed the later motion under §2255. Shelton, at 621. At that time, the petitioner argued that he had intended his prior motion to be construed as filed pursuant to Rule 12(b)(2) or Rule 33 and not § 2255. Shelton, at 621. The district court rejected the petitioner's argument and held that the second motion was a second or successive motion brought under 28 U.S.C. §2255. Shelton, at 621. The Sixth Circuit, in Shelton, decided to follow the Adams decision from the Second Circuit. Specifically, the Shelton Court agreed with Adams and held that "district courts should not recharacterize a motion purportedly made under some other rule as a motion made under section 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under section 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than to have it so recharacterized." Shelton, at 622, citing Adams, 155 F.3d at 584. The court went on to hold that because the district court, before recharacterizing the petitioner's first post-conviction filing as a §2255 motion, did not provide the petitioner with appropriate notice and an opportunity to withdraw, that motion could not

be counted against him for purposes of the bar on a successive § 2255 motion. Shelton, at 622. Again, the Sixth Circuit decided the issue in line with the majority of the circuits and in a manner that directly conflicts with the opinion of the Eleventh Circuit in Castro.

On July 19, 2002, the United States Court of Appeals for the District of Columbia Circuit rendered an opinion which perhaps best explains why the Castro decision was wrong and why this Petition for Writ of Certiorari should be granted. In United States v. Palmer, 296 F.3d 1135 (D.C. Cir. 2002), a pro se petitioner, in 1995 prior to the enactment of AEDPA, filed his first pro-se post conviction motion. Palmer, at 1137. The motion sought a new trial pursuant to Rule 33, just like Castro's motion. Palmer, at 1137. On December 5, 1995, the district court denied the Rule 33 motion. Palmer, at 1138. The D.C. Circuit then noted that "although Palmer's motion for a new trial based on newly discovered evidence is untimely under Federal Rule of Criminal Procedure 33, his request for a new trial can be treated as a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255." Id. Thereafter, the motion was decided on its merits and denied. Id.

The petitioner then filed a §2255 motion and the government argued that because the court had deemed the petitioner's Rule 33 motion as a motion for new trial and as a motion under 28 U.S.C. §2255, the first titled 2255 motion was subject to the procedural limitations of the newly enacted AEDPA. Id. The district court then dismissed the 2255 motion concluding that under the AEDPA the motion was successive and must initially be addressed by the Court of Appeals. Id., at 1141.

In determining whether or not petitioner's first titled 2255 motion was successive under the AEDPA, the court recognized that the AEDPA significantly changed the consequences of district courts converting post conviction motions of prisoners who unsuccessfully sought relief under some

other provision of law into motions made under 28 U.S.C. § 2255. Palmer, at 1143. The Palmer court discussed the decisions on this issue from all of the other circuits which had already decided this issue. The Palmer court also criticized the second Castro decision. Specifically, the Palmer court stated "moreover, Castro II's homage to congressional intent seems, to us, ill founded. Nothing in the AEDPA indicates that a post conviction motion not styled as a § 2255 motion must be deemed one simply because it could be so styled. Indeed, the AEDPA does not define a second or successive motion at all." Palmer, at 1146. The Court then went on to hold "in sum, having denominated his filing as a motion for new trial based on newly discovered evidence under Rule 33, Palmer was entitled to have his motion decided under that rule. We could have affirmed its denial as either untimely or meritless. Because Palmer was not given notice of the potential adverse consequences flowing from this Court's construction of his motion as a §2255 motion, we reverse the district court's order requiring Palmer to request a Certificate of Appealability pursuant to the AEDPA and remand for further proceedings consistent with this opinion." Palmer, at 1148. Again, the D.C. Circuit decided the issue differently and even criticized the Eleventh Circuit's decision in Castro.

Finally, the Eighth Circuit decided the issue on September 6, 2002. In Morales v. United States, 2002 U.S. Appeals Lexis 18333 (8th Cir. 2002), petitioner, after being sentenced, filed in the district court a pro-se "Petition for Right of Review Pursuant to Title 5, United States Code Section 702." Acting *sua sponte*, the district court reclassified his petition as a § 2255 motion. The Eighth Circuit held that "before a district court may reclassify a pro se litigants pleading as a section 2255 motion, it must warn him of the consequences of the reclassification and allow him an opportunity to withdraw his pleading." The Court held that the district court erred by failing to provide the petitioner a warning and an opportunity to withdraw his petition. The Court went on to state "we

agree with the majority approach, and we hold as follows. When a district court intends to reclassify a pro se litigant's pleading as a section 2255 motion, it must do two things. First, the court must warn the litigant of the restrictions on second or successive motions, and of the one year limitations period, set forth in 28 U.S.C. section 2255. Second, the court must provide him an opportunity either to consent to the reclassification or to withdraw his motion. Because the district court did not provide Morales with this information and an opportunity to choose which course of action to take, this case must be remanded so that Morales may decide whether to consent to reclassification or to withdraw his motion."

The Eleventh Circuit and the Fifth Circuit are the only circuits which hold that the AEDPA prohibits the filing of a first titled §2255 petition after a district court, without warning, recharacterizes a pro-se prisoner's first post conviction motion as a §2255 petition. Every other circuit has addressed the issue and has adopted either the Adams warnings or some variation of it. However, the Eleventh Circuit's decision in Castro is in direct conflict with the decisions and opinions rendered by every circuit other than the Fifth Circuit. The issue regarding the AEDPA and its effect on pro-se prisoner's first titled habeas petitions is not only important to Castro, but is of the utmost importance to all pro-se prisoner's in the Eleventh Circuit who are unfortunate enough to have had the court *sua sponte* recharacterize a post-conviction motion as a §2255 petition. This practice prevents prisoners from filing habeas petitions and prevents the hearing of potentially valid constitutional claims. This is especially true in Castro's case as a review of the record clearly shows that his first post-conviction motion, the Rule 33 Motion for New Trial, was a properly labeled motion. For the district court to be able to place any label it wishes on a post-conviction motion and then use the AEDPA to prevent the filing of a habeas petition seems unconscionable. Guidance is

desperately needed by this Court as to how court's of the varying circuits are to address this issue. The purpose of the AEDPA was not to prevent the filing of habeas petitions. However, such is the effect it has had in the Eleventh Circuit.

Throughout the opinions cited in this petition, much discussion revolves around whether or not the best approach to take is the prophylactic approach described by Adams and Miller or the remedial approach described by Raineri. However, all of the circuits save the Eleventh and the Fifth agree that if a district court recharacterizes a pro se petitioner's post conviction motion as a §2255 petition without informing the petitioner of the consequences of such action, such first post conviction motion will not count as a first petition under the purview of the AEDPA. Therefore, guidance by this Court is needed so that it will not depend on which circuit a petitioner files his habeas motion as to whether or not it will be heard. There is no justifiable reason why Castro's habeas petition would be heard in any circuit other than the Fifth or Eleventh.

CONCLUSION

Petitioner Hernan O'Ryan Castro respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari. The issue presented is of utmost importance as it seems that whether or not prisoners' potentially valid constitutional claims are heard depends on which circuit court has jurisdiction over the claim. There is no uniformity with regard to habeas petitions and how they are effected by the AEDPA. The Eleventh Circuit's opinion in Castro's case is inconsistent with the opinions of other circuit courts on this very important issue and therefore Castro requests that this Court grant his petition.

[signatures continued on next page]

This 30th day of September, 2002.

Michael G. Frick

MICHAEL G. FRICK
Georgia Bar # 277125
N. DANIEL LOVEIN
Georgia Bar # 459329

Attorneys for Petitioner Hernan O'Ryan Castro

HALL, BOOTH & SMITH, & SLOVER P.C.
11 St. Andrews Court, Ste. 200
Brunswick, GA 31520
(912) 554-0093